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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE STATE OF NEW YORK; THE COUNTY OF ALLEGHENY; and THE COUNTY OF CORTLAND,
Petitioners,

v.

THE UNITED STATES OF AMERICA, *et al.*,
Respondents,

THE STATE OF WASHINGTON; THE STATE OF NEVADA; and THE STATE OF SOUTH CAROLINA,
Intervenors-Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF US ECOLOGY, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS UNITED STATES OF AMERICA, *ET AL.*

IRWIN GOLDBLOOM
Counsel of Record
LATHAM & WATKINS
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, D.C. 20004-2505
(202) 637-2200

Of Counsel:
BRADLEY E. DILLON
General Counsel
US ECOLOGY, INC.
9200 Shelbyville Rd.
Suite 300
Louisville, KY 40207

KARL S. LYTZ
KIMBERLY M. MCCORMICK
LATHAM & WATKINS
701 B Street, Suite 2100
San Diego, CA 92101-8197
(619) 236-1234
Attorneys for US Ecology, Inc., Amicus Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. LLRW DISPOSAL HAS BEEN AN ISSUE OF VITAL CONCERN SINCE THE 1970s	5
A. LLRW Is Generated From A Diverse Variety Of Activities Highly Beneficial To Society	5
B. The 1980 Act Was Enacted To Solve A National LLRW Disposal Crisis	6
II. UNDER THE 1980 ACT AND 1985 AMENDMENTS, STATES HAVE MADE SIGNIFICANT PROGRESS IN SOLVING THE LLRW DISPOSAL CRISIS	8
A. California Has Reached The Final Licensing Stages For Its Facility	10
B. The Nebraska Facility Also Is Proceeding Apace	12
III. INVALIDATION OF THE 1985 AMENDMENTS WILL RECREATE THE NATIONAL CRISIS WHICH PROMPTED PASSAGE OF THE 1980 ACT AND 1985 AMENDMENTS	13
IV. THE 1980 ACT AND 1985 AMENDMENTS REPRESENT A JOINT FEDERAL/STATE SOLUTION TO THE HIGHLY-CHARGED POLITICAL PROBLEM OF LOW-LEVEL RADIOACTIVE WASTE DISPOSAL	17
A. The 1985 Amendments Benefits All States	17
B. The 1985 Amendments Do Not Unduly Burden The States	19

TABLE OF CONTENTS—Continued

Page

C. States Traditionally Have Regulated Matters Involving Public Health And Safety, Including The Regulation Of LLRW Generation And Disposal, And Thus Are Not Required By The 1980 Act Or The 1985 Amendments To Assume A New Regulatory Responsibility 21

D. Construction Of Individual State Facilities Is Not Economically Efficient, But Might Become Necessary If The 1985 Amendments Are Invalidated 24

CONCLUSION 25

TABLE OF AUTHORITIES

CASES Page

Hodel v. Virginia Surface Mining & Reclam. Ass'n, 452 U.S. 264 (1981) 4, 21
Philadelphia v. New Jersey, 437 U.S. 617 (1978) .. 17
U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978) 17
Washington State Bldg. & Constr. Trades Council v. Spellman, 684 F.2d 627 (9th Cir. 1982) 7, 17

STATUTES

Constitution

U.S. Const. art. I, § 10 17

Federal

Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2021(b) (1982) 21
Low-Level Radioactive Waste Policy Act, 42 U.S.C. §§ 2021b-2021d (1982) ..... *passim*
Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. §§ 2021b-2021i (Supp. III 1985) ..... *passim*
42 U.S.C. § 2021(b)(1)(D), (2)-(4) 16
42 U.S.C. § 2021d(a)(1), (2) 9
42 U.S.C. § 2021d note 2
42 U.S.C. § 2021e(d)(1)(A)-(C) 19
42 U.S.C. § 2021e(d)(2)(C) 20
42 U.S.C. § 2021e(d)(2)(E) 18
42 U.S.C. § 2021e(e)(1)(A)-(D) 18
42 U.S.C. § 2021e(e)(2)(A)-(D) 19
Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. 99-240, 99 Stat. 1859, 1864-1871 13
Southwestern Low-Level Radioactive Waste Disposal Compact Consent Act, Pub. L. 100-712, 99 Stat. 4773 11

State

California Radiation Control Law, Cal. Health & Safety Code § 25811.5 (West 1984) 10
Cal. Health & Safety Code § 25812 (West Supp. 1992) 10

TABLE OF AUTHORITIES—Continued

	Page
California Radiation Control Law, 1965 Cal. Stat. 1550	7-8
Southwestern Low-Level Radioactive Waste Disposal Compact, Cal. Health & Safety Code §§ 25877-25878.4 (West Supp. 1992)	11, 16
Cal. Health & Safety Code §§ 25875, 25876 (West 1984)	22
Central Interstate Low-Level Radioactive Waste Compact, Article V (c), (e), Neb. Rev. Stat. Vol. 2A, App. (BB) (1983)	13
Central Interstate Low-Level Radioactive Waste Compact, Article IV (h)(1), Neb. Rev. Stat. Vol. 2A, App. (BB) (1983)	13
Nebraska Low-Level Radioactive Waste Dispoal Act, Neb. Rev. Stat. §§ 81-15,101.01; 81-15,103; 81-15,104; 81-15,113 (1990)	12-13
REGULATIONS	
Federal	
Licensing Requirements for Land Disposal of Radioactive Waste, 10 C.F.R. § 61.55 (1982)	5
State	
Requirements for Land Disposal of Radioactive Waste, Title 17, Cal. Code of Regs. §§ 30470-30499 (1990)	10, 11
MISCELLANEOUS	
Adelstein & McKusick, *"Not in My Back Yard": Low-Level Radioactive Waste and Health*, Harv. Medical School Health Letter (April 1986)	6
Anderson, "Disposing of Low-Level Radioactive Waste in California—A Guidebook For Citizen Participation"—(June 1990)	23
Berkovitz, *Waste Wars: Did Conress "Nuke" State Sovereignty in the Low-Level Radioactive Waste Policy Amendments Act of 1985?*, 11 Harv. Envtl. L. Rev. 437 (1987)	7

TABLE OF AUTHORITIES—Continued

	Page
Brill, Alten, Lutzker, McKusick, Petersen, Powell & Weir, *Disposal of Low-Level Radioactive Waste—Impact on the Medical Profession*, 17 J.A.M.A. 2449 (Nov. 1, 1985)	6
Nuclear Waste—Slow Progress Developing Low-Level Radioactive Waste Disposal Facilities, U.S. General Accounting Office Report to the Chairman, Committee on Governmental Affairs, U.S. Senate, GAO/RCED-92-61 (January 1992)	*passim*
GAO Report at 5	16
GAO Report at 8	5
GAO Report at 10, 12	9
GAO Report at 12	14
GAO Report at 13	2, 3
GAO Report at 17	26
GAO Report at 20	14
GAO Report at 21	15
"Regulating the Disposal of Low-Level Radioactive Waste—A Guide to the Nuclear Regulatory Commission's 10 C.F.R. Part 61," Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission (August 1989)	22
Siskind, Dougherty & MacKenzie, "Extended Storage of Low-Level Radioactive Waste: Potential Problem Areas," Division of Waste Management, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, NUREG/CR-4062 (December 1985), 91-102	15

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BRIEF OF US ECOLOGY, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS UNITED STATES OF AMERICA, *ET AL.*

INTEREST OF THE *AMICUS CURIAE*

US Ecology, Inc. ("US Ecology") submits this brief as *amicus curiae* in support of Respondents' arguments upholding the constitutionality of the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. §§ 2021b-2021i (Supp. III

1985) ("1985 Amendments").[1] Enactment of the 1985 Amendments followed congressional passage in 1980 of the Low-Level Radioactive Waste Policy Act, 42 U.S.C. §§ 2021b-2021d (1982) ("1980 Act"), and at the express request of the states, afforded them significant control over the location and operation of disposal facilities for low-level radioactive waste ("LLRW") generated within their respective borders.

US Ecology and/or its predecessor have been managing LLRW, their principal business, since 1952. The company has a significant interest in this case as the current operator of two of the nation's three existing LLRW disposal facilities—those located near Beatty, Nevada, and Richland, Washington. US Ecology's Nevada facility has been scheduled to close on January 1, 1993, and the Washington facility will become the designated regional facility for the Northwest Interstate Compact on Low-Level Radioactive Waste Management ("Northwest Compact").[2]

US Ecology also has an interest in this case as the "license-designee" for the development and operation of new regional LLRW disposal facilities for the Southwestern Low-Level Radioactive Waste Disposal

[1] US Ecology files this brief by consent of the parties, pursuant to Rule 37.3 of the Rules of this Court. The parties' letters of consent have been filed with the Clerk.

[2] The Northwest Compact consists of the states of Washington, Oregon, Idaho, Montana, Utah, Alaska and Hawaii. 42 U.S.C. § 2021d note; *see also Nuclear Waste—Slow Progress Developing Low-Level Radioactive Waste Disposal Facilities*, U.S. General Accounting Office Report to the Chairman, Committee on Governmental Affairs, U.S. Senate, GAO RCED-92-61 (January 1992) (hereinafter *"GAO Report"*) at 13.

Compact ("Southwestern Compact")[3] and for the Central Interstate Low-Level Radioactive Waste Compact ("Central Compact").[4] California is the host state for the Southwestern Compact, and US Ecology is itself financing development of that regional facility pursuant to California state laws. Since 1986, the company has invested approximately $24,256,000 on this project. Nebraska is hosting the Central Compact's regional facility, the development of which is being funded jointly by US Ecology and the major LLWR generators in that compact. Since 1987, US Ecology has invested approximately $6,260,000 of its own funds in siting and licensing efforts in Nebraska.

Based on the foregoing, and in light of US Ecology's forty-year involvement in the handling of LLRW, US Ecology has a vital interest in this challenge to the constitutionality of the 1985 Amendments.

SUMMARY OF ARGUMENT

US Ecology, as *amicus curiae*, supports the position of the United States and urges the Court to uphold the constitutionality of the 1985 Amendments in their entirety. For the reasons primarily set forth by the United States in its brief, the 1985 Amendments do not impermissibly infringe upon state sovereignty. As explained below, the 1985 Amendments also are necessary to ensure that the nation timely

[3] The Southwestern Compact consists of the states of California, Arizona, North Dakota and South Dakota. 42 U.S.C. § 2021d note; *see also GAO Report* at 13.

[4] The Central Compact consists of the states of Nebraska, Kansas, Oklahoma, Arkansas and Louisiana. 42 U.S.C. § 2021d; *see also GAO Report* at 13.

develops the LLRW disposal capacity required to support the medical, industrial, academic and other activities which produce such waste, and to assure that such development occurs in a manner which does not unduly burden any state.

In fact, the 1980 Act and 1985 Amendments were enacted by Congress to resolve a LLRW disposal crisis which threatened the country in the late 1970s. In the 1980 Act and 1985 Amendments, Congress, at the urging of the states, accommodated both federal and state interests in an effective manner that avoided extensive intrusion in state affairs by providing a broad range of options and primary control to the states for the development of new LLRW disposal facilities. In so doing, Congress established

> a program of cooperative federalism that allows the states, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.

Hodel v. Virginia Surface Mining & Reclam. Ass'n, 452 U.S. 264, 289 (1981).

Following passage of the 1980 Act and 1985 Amendments, the states have made substantial progress in implementing regional solutions for LLRW disavow and undo the responsibilities voluntarily undertaken under both the 1980 Act and 1985 Petitioner New York, and the states filing *amicus* briefs in support of petitioners, however, now seek to disavow and undo the responsibilities voluntarily undertaken under both the 1980 Act and the 1985 Amendments by challenging the very legislation they and other states persuaded Congress to enact.

Because the 1985 Amendments do not unduly burden the states or tread on their sovereignty, but

rather equitably balance the rights and obligations of all states, including the three states now providing LLRW disposal capacity for the entire nation, the Court should affirm the Second Circuit's decision upholding the constitutionality of this legislation. Should the 1985 Amendments be invalidated, the LLRW disposal crisis of the late 1970s will return and result in potentially devastating impacts on the essential societal activities which produce this waste.

ARGUMENT

I. LLRW DISPOSAL HAS BEEN AN ISSUE OF VITAL CONCERN SINCE THE 1970s

A. LLRW Is Generated From A Diverse Variety Of Activities Highly Beneficial To Society

LLRW is a general term describing a wide variety of waste contaminated by radioactivity, including protective clothing, machinery, hardware, glassware, laboratory wastes, compacted solids and other substances. Over one million cubic feet of LLRW is generated annually nationwide, by nuclear power plants, businesses, hospitals and universities.[5]

Under the 1985 Amendments, states are responsible for a specific subset of LLRW defined by regulation in the licensing requirements for land disposal of radioactive waste, 10 C.F.R. § 61.55 (1982). Approximately ninety-seven percent of LLRW for which the states are responsible decays to safe levels within less than one hundred years, with the remainder decaying to acceptable levels witnin three hundred to five hundred years.[6]

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[5] *GAO Report* at 8.

[6] *GAO Report* at 8.

Examples of activities generating LLRW for which states are responsible include: (1) the use of radioactive isotopes in medical therapy, including the administration of Iodine-131 to treat overactive thyroid glands; (2) the use of radioactive isotopes as tracers to evaluate tissue or organ functions, such as in stress tests to determine cardiac activity, and to locate and treat prostate and certain other cancers; and (3) the addition of radioactive tracers to new drugs to evaluate the way in which the body processes the drug.[7] Biotechnology, one of the most important emerging industries in the country today, generates LLRW as an unavoidable byproduct of its activities. University laboratories conducting both basic and applied science research also generate LLRW, as do a variety of businesses manufacturing consumer products (*e.g.*, building exit signs, household smoke detectors). Hospitals, universities, radiopharmaceutical companies and small businesses do not generally have the capacity or the ability to store LLRW generated by their activities for extended time periods. Providing safe LLRW disposal is therefore an extremely important component of the infrastructure needed to support modern society.

B. The 1980 Act Was Enacted To Solve A National LLRW Disposal Crisis

In 1979, the states of Washington, Nevada and South Carolina threatened to close the only three

[7] Adelstein & McKusick, *"Not in My Back Yard": Low-Level Radioactive Waste and Health*, Harv. Medical School Health Letter (April 1986); Brill, Alten, Lutzker, McKusick, Petersen, Powell & Weir, *Disposal of Low-Level Radioactive Waste—Impact on the Medical Profession*, 17 J.A.M.A. 2449, 2451 (Nov. 1, 1985).

commercial LLRW disposal facilities in the nation.[8] In essence, these states were no longer willing to carry the national burden for LLRW disposal and wanted greater control over the origin and amount of wastes accepted at their facilities, including the right to prohibit the importation of wastes from other states.[9]

The Washington and Nevada facilities, constructed and operated by US Ecology, have been accepting LLRW for disposal since 1962 and 1963, respectively. The South Carolina facility opened in 1971.[10] Three other LLRW facilities in Kentucky, New York, and Illinois had closed by 1978.[11] Prior to passage of the 1980 Act, *no* state had taken any action to provide for the construction or operation of additional LLRW disposal facilities. In fact, some states, such as California, had enacted laws which functionally prohibited the licensing of such facilities.[12] Not surpris-

[8] In fact, two of the states had closed their facilities for short periods of time in the late 1970s in protest over waste transportation practices in those states. J.A. at 108a. In 1980, Washington citizens approved an initiative, later struck down as unconstitutional, banning the disposal of out-of-state waste from the Hanford facility. *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982).

[9] Berkovitz, *Waste Wars: Did Congress "Nuke" State Sovereignty in the Low-Level Radioactive Waste Policy Amendments Act of 1985?*, 11 Harv. Envtl. L. Rev. 437, 439 (1987).

[10] *Id.*

[11] *Id.*

[12] The California Radiation Control Law, 1965 Cal. Stat. 1550, prohibited the issuance of any LLRW disposal facility

ingly, private companies were disinclined to develop new sites given the tremendous financial risks created by the public controversy which surrounds radioactive waste disposal. Therefore, as a practical matter, closure of the Washington, Nevada and South Carolina facilities would have left the nation's hospitals, universities and industries with no ability to safely and legally dispose of their LLRW.

The 1980 Act, and subsequently the 1985 Amendments, were enacted to resolve this crisis by keeping the three existing sites open to the country for the time reasonably required for the states to organize themselves and develop new facilities, preferably on a regional basis which was both authorized and encouraged under the new laws. Requiring the development of new facilities relieved the unfair burdens that had been placed on Washington, Nevada and South Carolina. The 1985 Amendments ensured that a *de facto* return to the former unfair situation would not occur as a result of the unwillingness of some states to provide for disposal of LLRW generated within their borders.

II. UNDER THE 1980 ACT AND 1985 AMENDMENTS, STATES HAVE MADE SIGNIFICANT PROGRESS IN SOLVING THE LLRW DISPOSAL CRISIS

The constitutionality of the 1985 Amendments is not a purely legal question to be decided in a vacuum. Before passage of the 1980 Act and the 1985 Amendments, no state or private concern had initiated any effort to provide for new LLRW disposal capacity.

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license unless the facility was determined to be necessary for the state's economy, a finding which could not be made in light of the available disposal sites in Washington and Nevada.

Since passage of those laws however, states have made significant strides in solving the nation's LLRW disposal crisis.

As evidenced by the crisis which precipitated passage of the 1980 Act, solving the LLRW disposal problem requires federal legislation to ensure both that the country develops the necessary LLRW disposal facilities and that all states are treated equitably. The 1980 Act and 1985 Amendments empower the states to work together to develop regional LLRW disposal facilities and do not restrict the manner in which states may choose to provide for that disposal. States may construct their own facility or join a regional compact which will develop a facility for use by each of its member states.[13] Alternatively, a compact may establish arrangements with another compact or state to provide disposal facility access.

Most states have elected to join compacts which provide for regional disposal facilties.[14] Additionally, some states and compacts have chosen to engage private enterprise to undertake the development and construction of a LLRW disposal facility, rather than use state funds to finance facility development costs. For example, US Ecology currently is developing LLRW disposal facilities in California and Nebraska under agreements which do not rely on state appropriations for development expenses. It is precisely these types of flexible arrangements which the 1980 Act and 1985 Amendments intended to encourage, and which satisfy both federal and state concerns.

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[13] 42 U.S.C. § 2021d(a)(1), (2).

[14] By 1983, more than forty states had formed seven regional compacts, and currently forty-two states are members of nine compacts. *GAO Report* at 10, 12.

A. California Has Reached The Final Licensing Stages For Its Facility

California and the other members of the Southwestern Compact have made substantial progress toward the establishment of a regional LLRW disposal facility. In 1982, the California legislature directed the state Department of Health Services ("DHS") to study the feasibility of reducing LLRW generation, plan for interim storage of LLRW within California if the state were barred from existing disposal sites, develop screening criteria for selecting a disposal site in the state, and survey the state and identify regions most likely to meet those siting criteria. California Radiation Control Law, Cal. Health & Safety Code § 25811.5 (West 1984).

In 1983, the California legislature established a procedure for selecting a private company to site, construct and operate the state's LLRW disposal facility, and directed DHS to adopt regulations governing that facility's licensing and operation. Cal. Health & Safety Code § 25812 (West Supp. 1992). In 1984, DHS adopted the necessary regulations,[15] and completed state-wide regional screening which eliminated all but 20,000 square miles of the state from consideration as the location for the state's LLRW disposal facility.

US Ecology was selected as the "license-designee" for the California site in December 1985 and posted the required $1 million in performance guarantees. Site selection began shortly thereafter. The company has spent approximately $24,256,000 of its own funds on the site selection process, an extensive public information and involvement program, environmental

[15] Requirements for Land Disposal of Radioactive Waste, Title 17, Cal. Code of Regs. §§ 30470-30499 (1990).

impact and technical licensing studies, the facility design, preparation of the license application and responses to the state's technical review. The DHS has used US Ecology's annual license fee of $250,000 and the 1985 Amendments surcharge fee rebates to pay its costs in overseeing US Ecology's activities and conduct the technical licensing reviews and environmental impact analyses necessary for facility construction and operation. US Ecology will recover its investment, and a reasonable return on that investment, from fees charged for LLRW disposal at the new facility.[16]

In 1987, the California legislature ratified the Southwestern Compact (Southwestern Low-Level Radioactive Waste Disposal Compact Cal. Health & Safety Code §§ 25877-25878.4 (West Supp. 1992)), and Congress approved it in November 1988.[17] Under the Southwestern Compact, the California facility will provide LLRW disposal capacity for member states for a period of thirty years, after which another compact member state will host the regional disposal facility. Cal. Health & Safety Code § 25878, art. 4(C)(1) (West Supp. 1992).

In December 1991, DHS notified US Ecology that it had provided all information necessary for the state to reach its licensing decision on the proposed facility. DHS further stated that US Ecology's information satisfied DHS's guidance, and that DHS had completed its technical review. DHS is now in a

[16] Requirements for Land Disposal of Radioactive Waste, Title 17, Cal. Code of Regs. §§ 30489, 30493-30499 (1990).

[17] Southwestern Low-Level Radioactive Waste Disposal Compact Consent Act, Pub. L. 100-712, 99 Stat. 4773.

position to complete its decision record and acquire the proposed facility's site from the Department of Interior, Bureau of Land Management, thus allowing the license to take effect and construction to begin.

Final action on the facility's license and acquisition of the site for the facility recently have been slowed, however, by gathering political controversy being generated by various groups which oppose the project. California's submission of an *amicus* brief in support of New York suggests that this Court's review of the Second Circuit's decision is encouraging further delays by California, presumably under a theory that invalidation of the 1985 Amendments could free the state of its obligation to construct the facility. This would allow elected representatives and appointed public health officials to avoid making a politically controversial decision. Invalidation of the 1985 Amendments might also encourage California not to develop a disposal facility since, in the absence of that law, the state could not legally ban the acceptance of waste generated in other states once the facility was in operation. Invalidation of the 1985 Amendments, or any provision relieving the states of their responsibilities for LLRW disposal, would thus create additional, and perhaps irresistible, political pressure on California officials to stop the completion of the LLRW disposal facility, even at this advanced stage of its development.

B. The Nebraska Facility Also Is Proceeding Apace

The Central Compact LLRW disposal facility is being funded jointly by US Ecology and the major LLRW generators in the five member states. Nebraska Low-Level Radioactive Waste Disposal Act, Neb. Rev. Stat. §§ 81-15,101.01; 81-15,103; 81-15,104; 81-15,113

(1990). Development of the facility is overseen by the Central Interstate Compact Commission ("CICC") through contracts with generators and US Ecology.[18] The only public funds involved in the facility are the member states' annual dues, which are used to pay for activities of the CICC representatives and their office staff.[19] The Nebraska facility is also at an advanced stage of the development process, with a completed license application now undergoing detailed review by state regulatory agencies.

III. INVALIDATION OF THE 1985 AMENDMENTS WILL RECREATE THE NATIONAL CRISIS WHICH PROMPTED PASSAGE OF THE 1980 ACT AND 1985 AMENDMENTS

New York has asked this Court to not only find that the "take title" provision of the 1985 Amendments is unconstitutional, but also to strike down the act as a whole. If the 1985 Amendments are invalidated, disposal of the nation's LLRW will be thrown into a chaotic situation worse than that which prompted the initial passage of the 1980 Act. If incentives, and disincentives, regarding the creation of new disposal capacity are removed, it is unlikely that California, Nebraska or any of the regional compact host states will complete development of any new facilities. Public opposition and political reactions

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[18] Central Interstate Low-Level Radioactive Waste Compact, Article V (c), (e), Neb. Rev. Stat. Vol. 2A, App. (BB) (1983). The Central Compact was approved by Congress in 1985. Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. 99-240, 99 Stat. 1859, 1864-1871.

[19] Central Interstate Low-Level Radioactive Waste Compact, Article IV (h) (1), Neb. Rev. Stat. Vol. 2A, App. (BB) (1983).

to such controversial projects are just too great to overcome without the federal mandate and protections afforded by the 1985 Amendments.[20] Facility developers, waste generators and certain states would not have spent hundreds of millions of dollars on development of new regional disposal facilities over the last ten years without the expectation that those facilities would, in fact, be established. Certainly, the rights of these parties likely would have to be litigated if the current policy framework and related developmental efforts are abandoned.

Invalidation of the 1985 Amendments as a whole would defeat the purpose of the interstate compacts which Congress has ratified pursuant to the 1985 Amendments. In the absence of the 1985 Amendments, the compacts could not prevent the disposal of LLRW generated in non-member states. Compact host states in particular would be disinclined to allow construction of regional facilities because they could be compelled legally to accept waste generated in *all* other states. States with existing facilities are likely to act on their previous threats in 1979 to close those facilities for the same reason. The facilities in Nevada and South Carolina currently are scheduled to close at the end of 1992,[21] and the Washington facility's intention to stay open to serve the Northwest Compact would be directly undermined by invalidation of the federal legislation.[22] In the interim,

[20] *See GAO Report* at 20 (describing public opposition to proposed facilities).

[21] *GAO Report* at 12.

[22] In March 1990, the Governor of the State of Washington stated in a letter to the Secretary of Energy:

> "I will not permit Hanford [the state's disposal facility site near Richland] to become a disposal facility for

hospitals, universities, scientific researchers and small businesses that use radioactive materials will be unable to dispose of their LLRW. They will be faced with two equally untenable choices—resorting to illegal and/or unsafe disposal methods or halting highly beneficial but waste-producing activities, at least temporarily. For some entities, this could result in going out of business altogether.[23]

There are no other good solutions to this problem. Preemptive federal legislation involving federal selection of disposal sites in specific states, over their virtually certain objections, would create a solution *least sensitive* to states' rights, and certainly would diminish local and state participation in vital matters of public concern. It also would perpetuate the current inequitable situation among the states—whereby three states are undertaking responsibility for disposal of the entire nation's LLRW—which the 1980 Act and 1985 Amendments are intended to alleviate. In contrast, interstate compacts formed by the states

> states outside of our region . . . . We in Washington State have learned that, when compelled to find solutions to nuclear waste issues, political leaders adopt responsible positions."

GAO Report at 21.

[23] Extended interim storage by waste producers is not a viable long-term solution, even assuming that space constraints and local ordinance restrictions would otherwise allow such practices. Degradation of waste containers and the waste itself raises significant public health and worker safety concerns. Siskind, Dougherty & MacKenzie, "Extended Storage of Low-Level Radioactive Waste: Potential Problem Areas," Division of Waste Management, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, NUREG/CR-4062 (December 1985), 91-102.

pursuant to the 1980 Act and 1985 Amendments provide for the equitable distribution of responsibility for LLRW disposal among member states, and in some cases specifically identify the order in which states will sequentially host facilities.[24]

An entirely federal solution also is not viable at this late hour. The federal government, through the Department of Energy, stated in 1987 that it would begin managing the disposal of LLRW classified as greater than Class C, the most hazardous category of LLRW, in 1989. The responsibility was specifically assigned to the federal government in the 1985 Amendments.[25] DOE, however, has made no significant progress in selecting sites for the disposal of this waste and now does not anticipate being able to dispose of it until the year 2010![26] While the states may be progressing less expeditiously than originally anticipated, DOE's siting efforts are considerably less advanced. This situation gives little solace that a federally implemented solution would be timely, or even workable in the long term.

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[24] For example, the Southwestern Compact provides that California will be the first host state, to be succeeded by the largest major generator state other than California, which at this time is Arizona. Cal. Health & Safety Code § 25878, art. 4(C)(1) (West Supp. 1992).

[25] 42 U.S.C. § 2021(b)(1)(D), (2)-(4).

[26] *GAO Report* at 5.

IV. THE 1980 ACT AND 1985 AMENDMENTS REPRESENT A JOINT FEDERAL/STATE SOLUTION TO THE HIGHLY-CHARGED POLITICAL PROBLEM OF LOW-LEVEL RADIOACTIVE WASTE DISPOSAL

A. The 1985 Amendments Benefit All States

The 1980 Act and 1985 Amendments provided the states with two crucial benefits which they could not achieve in any manner other than through federal legislation—the right to form interstate compacts for LLRW disposal, and the right to exclude from regional facilities waste generated outside those compacts. A state cannot constitutionally restrict the acceptance of waste for disposal on the basis of its state of origin. *Philadelphia v. New Jersey*, 437 U.S. 617, 627-28 (1978); *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627, 630-32 (9th Cir. 1982) (state may not refuse to accept LLRW because it is generated outside the state). Nor can a state enter into a compact with another state affecting interstate commerce absent the consent of Congress. U.S. Const. art. I, § 10; *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 471 (1978).

In addition, the 1985 Amendments established incentives to prompt the non-sited states to act expeditiously in establishing regional and/or state facilities, and levied surcharge fees on LLRW producers in non-sited states which were paid to the sited states in exchange for their acceptance of waste from all states through December 1992. The surcharges served three purposes: (1) reimbursement of the sited states for their continued acceptance of LLRW generated outside those states; (2) application of pressure on the non-sited states, through their waste

producers who were paying the surcharges, to develop LLRW disposal solutions; and (3) defrayal of some of the cost of new facility development, through the payment of rebates comprised of a portion of the surcharge fees, to successfully progressing states who met developmental "milestones."

Under the 1985 Amendments, if a state met prescribed milestones for providing for disposal of ts LLRW, it became entitled to a rebate of twenty-five percent of the surcharge levied on waste generators for LLRW disposal at existing facilities in the three sited states.[27] States meeting the milestones used the surcharge rebates for costs related to regulation, development and construction of their own LLRW waste facilities. 42 U.S.C. § 2021e(d)(2)(E). This incentive program both rewarded the states for their timely development of LLRW disposal capacity and retained their discretion in deciding how to meet each milestone.

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[27] Those milestones for which a state would receive a surcharge rebate were as follows:

- July 1, 1986—State must join a compact or show intent to develop its own LLRW disposal facility.
- January 1, 1988—Compact must name host state and prepare siting plans.
- January 1, 1990—State must file complete application to operate a LLRW facility within the compact or state, *or* the governor must certify that the state will provide storage, disposal or management of its own LLRW by December 31, 1992.
- January 1, 1992—State must file complete application to operate a LLRW facility within the compact or state.

42 U.S.C. § 2021e(e)(1)(A)-(D).

B. The 1985 Amendments Do Not Unduly Burden The States

In addition to providing benefits to persuade the states to fulfill their responsibilities for LLRW disposal, the 1985 Amendments also include disincentives for noncompliance which may operate against both LLRW generators and the states.

Under the 1985 Amendments, LLRW generators in non-sited states must pay surcharges on waste disposed at existing sites.[28] If a state fails to meet the milestones discussed previously, the surcharges are increased in incremental amounts.[29] The most severe provision, and the one at which the petitioners direct

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[28] Those surcharge fees are as follows:

- 1986-1987—$10/cubic foot
- 1988-1989—$20/cubic foot
- 1990-1992—$40/cubic foot

42 U.S.C. § 2021e(d)(1)(A)-(C).

[29] Surcharge fees are increased based on a state's failure to meet the developmental milestones as follows:

- Failure to meet July 1, 1986 milestone—the 1986-1987 surcharge is doubled, and the non-site state generator may be denied access to an existing site after January 1, 1987.
- Failure to meet January 1, 1988 milestone—the 1988-1989 surcharge is doubled from January 1, 1988 to June 30, 1988; is quadrupled from July 1, 1988 to December 31, 1988; and the non-sited state generator may be denied access to an existing site after January 1, 1989.
- Failure to meet January 1, 1990 milestone—denial of access to an existing site.
- Failure to meet January 1, 1992 milestone—the 1990-1992 surcharge is trebled.

42 U.S.C. § 2021e(e)(2)(A)-(D).

their principal attack in this case, mandates that any state in noncompliance with the 1985 Amendments on January 1, 1996, must, at the request of an LLRW generator, take title to and possession of the LLRW generated within that state, and must also assume liability for it. 42 U.S.C. § 2021e(d)(2)(C).

This "take title" provision, however, is just one facet of the extensive array of choices on the part of the states which, when viewed in the context of the entire nationwide scheme, does not impermissibly transgress on the states' sovereignty. The burdens imposed by the "take title" provision are a fair and responsible balance to the benefits provided to the states by the 1985 Amendments.[30] Significantly, the "take title" provision is also the only disincentive in the 1985 Amendments which accrues specifically to the states. Increased disposal fees and loss of disposal facility access, for example, accrue to waste producers, not the states.

[30] If the "take title" provision were invalid, the provision that allows the states of Washington, Nevada and South Carolina to prevent importation of out-of-state LLRW to their existing LLRW facilities would effectively accomplish the original purpose of both the 1980 Act and 1985 Amendments. In the absence of out-of-state disposal facilities, each state would simply have to assume the responsibility for disposal of LLRW generated within its borders. This provision, in combination with the 1985 Amendments' provisions allowing states to form interstate regional compacts and preclude the importation of LLRW into the region, would provide the impetus for the development of new facilities. If these provisions, which clearly do not infringe on states' rights, remain in place, the 1985 Amendments would still encourage the states to continue to develop facilities already underway, even if the "take title" provision were invalidated.

Because the states are treated equally and have wide discretion in determining how to comply with the 1985 Amendments, including the ability to allocate responsibility for disposal facility development to private enterprise, the 1985 Amendments as a whole, including but not limited to the "take title" provision, do not force a state to enter into a proprietary enterprise and do not force the expenditure of monies from a state's treasury for the purpose of enforcing a federal regulatory scheme.

The 1985 Amendments represent precisely the type of "program of cooperative federalism"—least intrusive to the states and accommodating both federal and state interests—envisioned and applauded by this Court in *Hodel v. Virginia Surface Mining & Reclam. Ass'n*, 452 U.S. at 289. Accordingly, these laws do not impermissibly tread on state sovereignty.

C. States Traditionally Have Regulated Matters Involving Public Health And Safety, Including The Regulation Of LLRW Generation And Disposal, And Thus Are Not Required By The 1980 Act Or The 1985 Amendments To Assume A New Regulatory Responsibility

States traditionally have exercised their police powers to regulate precisely the types of activities at issue here—medical care, scientific research activities and commercial endeavors generating LLRW. State regulation of certain nuclear activities, including LLRW disposal, long has been encouraged by provisions of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2021(b) (1982), which allow states to exercise responsibility over nuclear byproduct materials, source materials, and special nuclear materials in quantities insufficient to form a

critical mass. *See also* Cal. Health & Safety Code §§ 25875, 25876 (West 1984). By 1988, twenty-nine states, including New York, had entered into agreements with the Nuclear Regulatory Commission and now regulate over sixty-five percent of the nation's 20,000 licenses using these types of nuclear materials.[31] Far from imposing on states' rights, the 1985 Amendments further ensured that the states will continue to participate in and regulate this area of vital concern.

Local communities are most directly impacted by a decision to locate a LLRW disposal facility in their area. "The public is more likely to accept siting and other waste management decisions made by state government than by a more remote, less accessible federal agency." J.A. at 114a. The scheme created jointly by Congress and the states in the 1980 Act and 1985 Amendments gave states broad leeway in selecting preferable methods and locations for disposing of their LLRW. This discretion in turn provides for maximum input from local communities regarding land use and licensing decisions. This is another example of the exercise of "cooperative federalism" by which Congress provided for substantial local involvement in administering a difficult and vexing problem.

The process undertaken by US Ecology in conjunction with the State of California, with respect to siting and licensing the proposed regional facility for the Southwestern Compact, illustrates the benefits of

[31] "Regulating the Disposal of Low-Level Radioactive Waste —A Guide to the Nuclear Regulatory Commission's 10 C.F.R. Part 61," Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission (August 1989), § 5.5.1.

both state and community participation in such decisions.[32]

In 1986-87, an independent site selection Citizens Advisory Committee ("CAC") was formed to assist US Ecology in narrowing a list of eighteen desert basins in the Mojave Desert to sixteen candidate siting areas, and later three specific sites which received more detailed analysis.[33] The CAC met six times from June 1986 through January 1987, and US Ecology also held three rounds of public workshops in widespread locations to directly involve the general public in the site selection process. Using information developed at these public workshops, US Ecology in 1987 announced the selection of three sites for further study.

Following extensive environmental and technical site characterization studies, including detailed field investigations and the formation of Local Advisory Committees ("LACs") for the three candidate site areas, a location in the Ward Valley was identified as

[32] The history of the California facility's development is described in Anderson, "Disposing of Low-Level Radioactive Waste in California—A Guidebook For Citizen Participation"—(June 1990), published by the League of Women Voters, Southern California Regional Task Force.

[33] The CAC was composed of twelve citizens—two members were appointed by each Board of Supervisors of three counties under consideration for the site—Inyo, Riverside and San Bernardino; the League of Women Voters appointed three members from those counties; and the remaining three members were appointed by the Sierra Club, the Native American Heritage Commission and the California Radioactive Materials Management Forum.

the preferred site in March 1988. The selection was reached based on the results of scientific field studies and input from the four citizen advisory committees, the public, government agencies and public interest organizations. Each LAC played a key role in voicing local concerns, including assessing local impacts and suggesting ways to mitigate those impacts.

The California facility has been the subject of meaningful state, local and public participation from its inception. It is precisely this level of broad, locally-oriented participation which the concept of "cooperative federalism," embodied by Congress in the joint federal/state nature of the 1980 Act and 1985 Amendments, is intended to promote.

D. Construction Of Individual State Facilities Is Not Economically Efficient, But Might Become Necessary If The 1985 Amendments Are Invalidated

Construction and operation of LLRW disposal facilities in each state would be prohibitively expensive due to the small volumes of LLRW generated in most states. The cost to dispose of LLRW at the three existing disposal facilities has increased from approximately $10 per cubic foot to more than $80 per cubic foot in less than fifteen years. The surcharge fees established in the 1985 Amendments for disposal of LLRW at the three existing sites through December 1992 have more than doubled the cost of waste disposal for generators in non-sited states.

The substantial costs of siting and licensing a new LLRW disposal facility are largely independent of the amount of waste to be disposed. Recovery of developmental expenses, however, is based on the type

and amount of waste received. Consequently, economies of scale are a significant factor. The astronomical increase in disposal costs resulting from the construction of individual state facilities would so severely impact the most cost-sensitive LLRW generators—hospitals, universities, researchers and small businesses—that they may be forced to cease operating, curtail services or engage in unsafe and perhaps illegal disposal practices. As the National Governors' Association Task Force and Congress in the 1980 Act and 1985 Amendments concluded, a regional solution is the best method for providing for safe and efficient disposal of LLRW nationwide. J.A. at 113a. Nevertheless, if the impetus for the development of economically efficient regional facilities created by the 1985 Amendments is removed, development of uneconomical, individual state facilities might become necessary.

CONCLUSION

The 1980 Act and 1985 Amendments together provide for development of a national infrastructure for the disposal of LLRW, with the states playing a leading and highly discretionary role in providing for that infrastructure. By authorizing interstate compacts to exclude waste generated outside the compact, the federal legislation provides a strong impetus to each state to solve its LLRW disposal problem on a regional basis and in a timely manner. This approach avoids the uncertainty and inequality inherent in the current system which relies upon three existing state sites to provide disposal capacity for the remaining forty-seven states.

Moreover, there are currently only two companies in the nation which develop and operate commercial LLRW disposal facilities—US Ecology and Chem Nuclear Systems, Inc. Without a federal legislative mandate offering some assurance that the states will support construction of such controversial facilities, private industry would likely leave the field. As a recent report by the General Accounting Office graphically describes, the administrative, environmental and political requirements for constructing and operating an LLRW disposal facility, even under the 1980 Act and 1985 Amendments, are daunting.[34] If the federal legislative mandate providing the states with impetus to support the development of such facilities is removed, the magnitude of the task and the high risk of protracted regulatory approval delays and potential project failure will remove any justification or incentive for future private investment in such facilities. Furthermore, there is a substantial risk that all of the LLRW disposal facility projects currently under development pursuant to that legislation would come to a halt, and that the three existing LLRW disposal facilities will be closed by their host states.

Because the 1985 Amendments provide a joint federal/state solution to the LLRW disposal crisis

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[34] Facility development has proved more complex and time-consuming than the states originally anticipated. The process has involved the states in many legislative, administrative, programmatic, and technical matters. These have included the development of implementing legislation; the selection of facility developer; the development and implementation of site-selection and facility-development programs, including initiatives to involve the public; and the need to address public opposition and legal challenges to the development process. *GAO Report* at 17.

which is constitutionally valid, protects the public health and welfare, and is both efficient and economical, this Court should affirm the legislation's validity.

Respectfully submitted,

IRWIN GOLDBLOOM
Counsel of Record
LATHAM & WATKINS
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, D.C. 20004-2505
(202) 637-2200

KARL S. LYTZ
KIMBERLY M. MCCORMICK
LATHAM & WATKINS
701 B Street, Suite 2100
San Diego, CA 92101-8197
(619) 236-1234

Of Counsel:
BRADLEY E. DILLON
General Counsel
US ECOLOGY, INC.
9200 Shelbyville Rd.
Suite 300
Louisville, KY 40207

Attorneys for US Ecology, Inc., Amicus Curiae

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